

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

Civil Action No. 19-cv-2233

WILDEARTH GUARDIANS
301 N. Guadalupe, Suite 201
Santa Fe, NM 87501

Plaintiff,

v.

OFFICE OF THE SECRETARY OF THE INTERIOR, a federal agency within the U.S.
DEPARTMENT OF THE INTERIOR,
1849 C Street, N.W.
Washington, D.C. 20240

U.S. DEPARTMENT OF THE INTERIOR, a federal agency,
1849 C Street, N.W.
Washington, D.C. 20240

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Defendants Office of the Secretary of the Interior (“OSI”) and United States Department of the Interior (“DOI”) are agencies that have wrongfully withheld records responsive to a request made by Plaintiff WildEarth Guardians (“Guardians”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552, *et seq.*

2. FOIA’s “basic objective” is “the fuller and faster release of information.” *Oglesby v. Dep’t of Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990). Recognizing that FOIA requesters are harmed when agencies do not ensure prompt public access to agency records, Congress has repeatedly amended FOIA to address unreasonable agency delay.

For example, the Electronic Freedom of Information Act Amendments of 1996 confirmed that “[t]he purposes of this Act are to-- (1) foster democracy by ensuring public access to agency records and information; (2) improve public access to agency records and information; (3) ensure agency compliance with statutory time limits; and (4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.” 110 Stat. 3048, 104 P.L. 231, Sec. 1.

3. Congress determined that FOIA litigation is subject to expedited judicial consideration. Unlike other civil litigation involving a federal agency, a responsive pleading is required within thirty days of service. 5 U.S.C. § 552 (a)(4)(C) (“Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.”).

4. On December 27, 2018, Guardians filed a written FOIA request. ECF No. 1-1 (“FOIA Request”). The FOIA Request sought prompt access to agency records involving the DOI’s proposed revisions to its FOIA regulations (“DOI’s Proposed FOIA Regulation Revisions”). *See* ECF No. 1-1. The FOIA Request also included a pre-publication version of DOI’s Proposed FOIA Regulation Revisions. ECF No. 1-1 at 7-30. When Guardians submitted the FOIA Request, it received an automatic response stating that “no FOIA requests can be accepted or processed” as a result of the partial government shutdown that occurred from December 22, 2018 to January 25, 2019. ECF No. 1-2 at 3.

5. Despite its unwillingness to comply with mandatory FOIA processing during the government shutdown, DOI decided to publish DOI's Proposed FOIA Regulation Revisions during the shutdown. This, along with the thirty-day comment period was part of an attempt to curtail public participation in the rulemaking process. *See* 83 Fed. Reg. 67,175 (Dec. 28, 2018).

6. Guardians sent DOI a formal request to increase the comment period to 120 days and to hold public hearings on this topic of great public interest. ECF No. 1-2. A diverse array of 92 individuals that are university professors and representatives of advocacy organizations involved in environmental, transparency, Native American, veterans, consumer protection, animal rights, and other issues signed this formal extension request. *Id.*

7. DOI ignored the formal extension request and only added a single additional day to the comment period due to a "technical glitch on www.regulations.gov in mid-January." 84 Fed. Reg. 409, 410 (Jan. 28, 2019). As a result, comments on DOI's Proposed FOIA Regulation Revisions were due by January 29, 2019, just 4 days after the end of the shutdown. This precluded the public from discussing DOI's Proposed FOIA Regulation Revisions with agency staff, including the staff point of contact listed in the Federal Register notice, in time to meaningfully affect their comments.

8. DOI's failure to include the public in the decisionmaking process is unsurprising given that DOI's Proposed FOIA Regulation Revisions are another step in DOI's attempt to avoid FOIA's requirements and operate in secrecy. DOI's Proposed FOIA Regulation Revisions are a topic of great public interest because, if passed, they

will severely undermine government transparency, violate FOIA, and limit important public rights guaranteed by statute.

9. On January 23, 2019, 27 days after it filed its FOIA Request, Guardians received communication from OSI acknowledging that Guardians filed the FOIA Request on December 27, 2018, but stating that it had received the FOIA Request on January 22, 2019. OSI assigned the number “OS-2019-00322” to the FOIA Request.

10. OSI stated that it was placing the request on the “normal” processing track, which is for requests that will take between six and twenty workdays to process. 43 C.F.R. § 2.15(c)(2) (processing track regulation). OSI also incongruously said that it was taking a ten-workday extension beyond the twenty-workday time period required under FOIA, and applicable to “normal” FOIA requests under DOI’s regulations, to process the FOIA Request. OSI cited 43 C.F.R. § 2.19 for this extension, but did not claim any “unusual circumstances” were present meriting the ten-workday extension.

11. OSI did not request that Guardians limit the scope of its FOIA Request or agree to an alternative time period for processing the Request. OSI did not provide a determination on Guardians’ request for a fee waiver. OSI did not provide a date certain by which OSI will process the FOIA Request. OSI did not make a determination on the FOIA Request. OSI did not produce any records responsive to Guardians’ FOIA Request.

12. Guardians did not receive any additional communication from OSI related to the FOIA Request by the January 28, 2019, deadline for a final determination on the Request. Guardians did not receive any additional communication from OSI related to the FOIA request by February 11, 2019, ten workdays after the determination deadline. Guardians did not receive any additional communication from OSI related to the FOIA

request by February 20, 2019, twenty working days after OSI's purported receipt of the FOIA Request. Guardians did not receive any additional communication from OSI related to the FOIA request by March 6, 2019, thirty working days after OSI's purported receipt of the FOIA Request.

13. On May 20, 2019, Guardians emailed OSI to inquire about OSI's processing of the FOIA Request. ECF No. 1-3.

14. Despite the fact that OSI's determination was already nearly four months overdue, OSI response stated that there were still 275 requests ahead of Guardians' FOIA Request at that time. ECF No. 1-3. OSI did not request that Guardians limit the scope of its FOIA Request or agree to an alternative time period for processing the Request. OSI did not provide a determination on Guardians' request for a fee waiver. OSI did not provide a date certain by which OSI will process the FOIA Request. OSI did not make a determination on the FOIA Request. OSI did not produce any records responsive to Guardians' FOIA Request.

15. As of the filing of this Complaint, OSI has still neither produced all records responsive to Guardians' FOIA Request nor made a final determination on Guardians' FOIA Request.

16. As of the filing date of this Complaint, 211 days have passed since Guardians submitted the FOIA Request to OSI.

17. Contrary to the Congressional mandate to make responsive records promptly available to FOIA requesters (110 Stat. 3048, 104 P.L. 231, Sec. 1), OSI failed to make a determination on Guardians' FOIA Request within the statutory time limit. 5

U.S.C. § 552(a)(6). OSI has failed to provide prompt access to the agency records described by Guardians' FOIA Request. 5 U.S.C. § 552(a)(3)(A).

18. By violating FOIA, Defendants have violated Guardians' right to promptly access agency records not subject to a recognized FOIA exemption upon filing a written request, a statutory right that each FOIA requester enjoys regardless of the requester's purpose. 5 U.S.C. § 552.

19. The withholding of agency records not subject to one of FOIA's nine recognized exemptions (5 U.S.C. § 552(b)) denies Guardians' FOIA right to promptly access information necessary to carry out its organizational mission. Guardians' organizational mission includes serving as a watchdog for DOI's land management activities, and the ability to properly gain access to records related to those activities through FOIA is an indispensable tool to carry out that mission. Because DOI's Proposed FOIA Regulation Revisions threaten Guardians' ability to timely and properly secure those agency records, they are a serious threat to Guardians' ability to carry out its mission. Defendants' withholding of records related to DOI's Proposed FOIA Regulation Revisions increases that threat by depriving Guardians of information necessary to effectively understand, and oppose, DOI's Proposed FOIA Regulation Revisions.

20. Guardians requests relief including an order finding that Defendants have violated FOIA, directing Defendants to make a prompt determination on Guardians' FOIA Request supported by Agency declarations documenting each search and each assertion of a FOIA exemption, and compelling Defendants to promptly provide Guardians with the responsive records by a date certain.

II. JURISDICTION AND VENUE

21. This Court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant” under FOIA. 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty).

22. This Court has additional statutory authority to grant injunctive relief pursuant to 28 U.S.C. § 2202. This Court has statutory authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has statutory authority to award costs and attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations. The District Court decides FOIA cases *de novo*. 5 U.S.C. § 552(a)(4)(B).

23. OSI’s failure to make a lawful determination on Guardians’ FOIA Request within twenty working days of its December 27, 2018, filing with OSI is construed as a denial of the FOIA Request and waives further exhaustion of administrative appeals requirements that can otherwise apply in FOIA cases. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i).

24. In the alternative, OSI’s failure to make a lawful determination on Guardians’ FOIA Request within an additional ten working days of the above twenty-working-day determination deadline or within twenty working days or thirty working days of OSI’s January 22, 2019 purported day of receipt of the FOIA Request (i.e. by March 6, 2019, at the absolute latest) is construed as a denial of the FOIA Request and

waives further exhaustion of administrative appeals requirements that can otherwise apply in FOIA cases. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i).

25. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Guardians' FOIA Request. 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

26. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B). Venue is also appropriate under 28 U.S.C. § 1391 because Defendants are agencies of the United States with their primary offices in Washington, D.C., and a substantial part of the events or omissions giving rise to this claim occurred in this judicial district.

27. In addition to *de novo* review and authority to compel agency FOIA compliance, this Court has statutory authority to refer this matter to the Special Counsel to investigate and make binding recommendations to remedy the potentially arbitrary and capricious circumstances surrounding the Defendants' withholding of records. 5 U.S.C. § 552(a)(4)(F). The Special Counsel provision is a reform mechanism Congress adopted to remedy persistent agency resistance to FOIA's open government purposes. This unique statutory provision promotes judicial efficiency and preserves judicial resources by empowering the Special Counsel to directly carry out investigations into potentially arbitrary and capricious circumstances and make binding recommendations that ensure Defendants fulfill FOIA's purposes going forward. *Id.*

28. “In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.” 5 U.S.C. § 552(a)(4)(G).

29. The FOIA claims made in this Complaint are ripe for judicial review and the harm Defendants have caused to Guardians can be remedied by an order of this Court.

III. PARTIES

30. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has offices in Colorado, Montana, New Mexico, Arizona, Washington, and Oregon.

31. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA. Guardians filed the FOIA Request at issue and has standing to bring this FOIA suit.

32. Guardians brings this action on its own behalf and on behalf of its adversely affected members. With more than 238,000 members and supporters, Guardians works to sustain a transition from fossil fuels to clean energy in order to safeguard the West. Specifically, the records sought in this action are requested in support of Guardians’ need to ensure it will be able to receive the records it needs under FOIA to serve as a watchdog over DOI’s management of federal public lands and the programs it is charged with implementing, including its activities related to oil, gas, and coal extraction on federal lands. DOI’s Proposed FOIA Regulation Revisions threaten Guardians’ ability to timely and properly secure those agency records. As a result, DOI’s

Proposed FOIA Regulation Revisions are a serious threat to Guardians' ability to carry out its mission. Defendants' withholding of records related to DOI's Proposed FOIA Regulation Revisions increases that threat by depriving Guardians of information necessary to effectively understand, and oppose, DOI's Proposed FOIA Regulation Revisions.

33. Guardians works in furtherance of its goals in part by acquiring information regarding federal programs and activities through FOIA. Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through various sources including publications, reports, its website and newsletter, general news media coverage, and public presentations. Guardians' successful efforts at educating the public on issues concerning federal government programs and activities that affect the environment contribute significantly to the public's understanding of governmental operations and activities. Guardians also uses the information that it acquires through FOIA to participate in federal decision-making processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal environmental laws.

34. Guardians regularly uses FOIA as an important avenue for gaining information about agency activities. Guardians is harmed when it is denied timely access to documents to which it is entitled. Guardians intends to continue its use of FOIA to access agency records in the possession of Defendants. Specifically, Guardians has concrete plans to submit additional FOIA requests to OSI, and to DOI and its other constituent agencies more broadly, as Guardians' advocacy efforts continue, and to

follow up on the information learned while reviewing agency records responsive to the present FOIA Request.

35. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups incorporated in many federal laws applicable to federal agencies, including the Administrative Procedure Act. *See, e.g.,* 5 U.S.C. §§ 551, *et seq.* Guardians uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the management of public land and other public resources. Guardians intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. DOI's Proposed FOIA Regulation Revisions involve environmental harms. DOI manages vast federal public lands, including management of an array of destructive activities on those lands such as mining (by means including drilling, hydraulic fracturing ("fracking"), and blasting), offroad vehicle use, and livestock grazing. By preventing and delaying the release of records under FOIA, Defendants increase the likelihood that its actions will cause damage to the environment and that the health and safety of the general public will be compromised before the public even knows it is happening. The harms flowing from DOI's Proposed FOIA Regulation Revisions and Defendants' failures to timely provide Guardians with a determination on its FOIA Request and production of the records thereunder can be at least partially remedied by ensuring Guardians has prompt access to public records sought by the FOIA Request and in future requests on the same and/or similar subject matter.

36. Guardians, its staff, or one or more of its members have and will suffer direct injury by the Defendants' failure to comply with the statutory requirements of

FOIA, and a favorable outcome of this litigation will redress that injury. Defendants' refusals to provide timely FOIA access to agency records prevent Guardians' informed involvement in Defendants' time-limited opportunities to participate in administrative processes. DOI's Proposed FOIA Regulation Revisions are a prime example of this as the comment period for this proposed rule has long since ended, but Guardians is still waiting on the records that would have allowed it to adequately understand and comment on that rulemaking. This happened despite Guardians submitting its FOIA request the day before the proposed rule was even published in the federal register. Harm to the environment flows from Defendants' FOIA violations, which conceal the facts and circumstances of DOI's decision to undertake the Proposed FOIA Regulation Revisions and the threats to the environment that this attack on transparency portends.

37. Guardians is also harmed by Defendants' failure to use its tracking system to provide, amongst other things, a current estimated completion date or to otherwise provide Guardians with a current estimated completion date for the FOIA Request. This failure prevents Guardians from planning for review of the records and deprives Guardians of information necessary to determine whether it must litigate the request at issue in order to quickly secure the records that it has requested. Guardians brings this action on behalf of itself, its staff, and its members.

38. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY ("OSI") is an agency as defined by 5 U.S.C. § 552(f)(1). FOIA charges OSI with the duty to provide public access to agency records in its possession or control. OSI possesses records responsive to Guardians' FOIA Request. OSI is denying Guardians access to its records in contravention of federal law.

39. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR, (“DOI”) is an agency as defined by 5 U.S.C. § 552(f)(1). FOIA charges the DOI with the duty to provide public access to agency records in its possession or control. DOI, and its various bureaus, departments, offices, and agencies, possesses records requested by Guardians. DOI is denying Guardians access to its records in contravention of federal law. DOI’s Office of the Solicitor provides legal and non-legal services to OSI and other DOI bureaus, departments, offices, and agencies.

40. The UNITED STATES DEPARTMENT OF INTERIOR, OFFICE OF THE SOLICITOR (“Office of the Solicitor”) is a federal agency as defined by 5 U.S.C. § 552(f)(1). The Office of the Solicitor must be consulted before DOI or OSI may deny a FOIA request by withholding records responsive to a FOIA request. 43 C.F.R. §§ 2.23(c), 2.24(b)(5). When Defendants carry out FOIA duties involving FOIA exemptions (5 U.S.C. § 552(b)), the Office of the Solicitor acts as a DOI FOIA Officer and acts outside the capacity of an attorney providing legal advice to a client in preparation for litigation. The Office of the Solicitor is not named as a defendant separate from DOI at this time. On information and belief, the Office of the Solicitor possesses agency records responsive to Guardians’ FOIA Request. The Office of the Solicitor possesses discoverable agency records that are relevant to judicial review of the Defendants’ processing of Guardians’ FOIA Request.

41. Defendants failed to lawfully make a determination on Guardians’ FOIA Request within the statutory twenty working day limit. As of the filing of this Complaint, Defendants have not made and communicated a determination on the FOIA Request. As of the filing of this Complaint, each Defendant possesses, controls, and unlawfully

withholds agency records responsive to Guardians' FOIA Request that are not subject to a FOIA exemption. As of the filing of this Complaint, Defendants have not completed a FOIA-compliant search for records responsive to Guardians' FOIA Request. As of the filing of this Complaint, and despite Guardians' request, Defendants have neither provided a current estimated completion date for their final determination nor agency records responsive to the FOIA Request. Guardians seek judicial remedies provided by Congress to obtain prompt access to the records described in the FOIA Request that Defendants are withholding.

IV. STATEMENT OF FACTS AND SUMMARY OF LAW

42. On December 27, 2018, Guardians submitted a written FOIA Request to OSI.

43. On January 23, 2019, Guardians received communication from OSI acknowledging that Guardians filed the FOIA Request on December 27, 2018, but stating that it had received the FOIA Request on January 22, 2019.

44. Through the January 23, 2019 communication, OSI assigned the number "OS-2019-00322" to the FOIA Request. OSI stated it was placing the request under the "Normal" processing track, which is for requests that will take between six and twenty workdays to process. 43 C.F.R. § 2.15(c)(2). OSI also stated that it was taking a ten workday extension to process the FOIA Request, citing 43 C.F.R. § 2.19, but did not claim any "unusual circumstances" were present meriting the 10-workday extension.

45. The 20th working day after December 27, 2018, fell on January 28, 2019. OSI did not provide Guardians with a determination on its FOIA Request during the twenty working day period following December 27, 2018.

46. The 30th working day after December 27, 2018, fell on February 11, 2019. OSI did not provide Guardians with a determination on its FOIA Request during the thirty working day period following December 27, 2018.

47. The 20th working day after January 22, 2019, OSI's purported receipt date for the FOIA Request, fell on February 20, 2019. OSI did not provide Guardians with a determination on its FOIA Request during the twenty working day period following January 22, 2019.

48. The 30th working day after January 22, 2019, OSI's purported receipt date for the FOIA Request, fell on March 6, 2019. OSI did not provide Guardians with a determination on its FOIA Request during the thirty working day period following January 22, 2019.

49. On information and belief, OSI does not have its own FOIA request status webpage and instead uses the DOI's FOIA Request Status webpage (<https://foia.doi.gov/requeststatus>) as its means for complying with FOIA's requester notification provisions. DOI's FOIA Request Status webpage has an entry for OS-2019-00322. As of the filing of this Complaint, this entry states that the "Due Date for Determination" for the FOIA Request is February 19, 2019. As of the filing of this Complaint, this entry states that the "Estimated Processing Completion Date" for the FOIA Request is February 19, 2019. As of the filing of this Complaint, those dates have passed and Defendants have not updated the entry.

50. OSI's communications did not notify Guardians of a telephone line dedicated to tracking FOIA requests, and Guardians' counsel has been unable to locate such a telephone line. On information and belief, Defendants do not utilize a telephone

line dedicated to tracking FOIA request status. If Defendants do utilize a telephone line dedicated to tracking FOIA request status, on information and belief, that telephone line does not provide a current estimated processing completion date for FOIA Request number OS-2019-00322.

51. Guardians did not receive any additional communication from OSI related to the FOIA Request. On May 20, 2019, Guardians emailed OSI to request an update and an updated estimated completion date given that the previous estimated completion date had passed.

52. OSI responded by email and indicated that it still intended to fulfill 275 FOIA requests before it even started to address Guardians' FOIA Request. OSI did not provide a date certain by which it estimated it would complete the FOIA Request.

53. Defendants possess or control, and are withholding, agency records responsive to Guardians' FOIA Request that are not subject to a FOIA exemption. Defendants' withholding of agency records is unlawful. Alternatively, responsive records were transferred to the Office of Solicitor, and persons within the DOI serving as counsel to OSI and/or DOI FOIA Officers are withholding records responsive to Guardians' FOIA Request.

54. As of the filing of this Complaint, one or more Defendants continue to withhold agency records responsive to the FOIA Request. As of the filing of this Complaint, Defendants have not made and communicated a final determination on the FOIA Request. As of the filing of this Complaint, Defendants have not completed a FOIA-compliant search. As of the filing of this Complaint, Defendants have not provided the "cut-off date" used for any search, thereby frustrating Guardians' intent to file a

follow-up FOIA request. As of the filing of this Complaint, Defendants have provided neither a *Vaughn* index nor any detailed explanation for withholding any of the specific agency records being withheld in full or in part. As of the filing of this Complaint, Defendants have not produced any records responsive to Guardians' FOIA Request.

55. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek to “ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 (2007); *see also Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172-73 (2004) (FOIA is “a means for citizens to know what their Government is up to.” This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.”) (internal citation omitted).

56. An agency violates FOIA whenever it withholds an agency record that is not subject to a recognized FOIA exemption. 5 U.S.C. § 552(a). This lawsuit is necessary to vindicate Guardians' right to know, which is violated by Defendants' unlawful withholding of responsive agency records, in part, by failing to make a determination on Guardians' FOIA Request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(i). Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits of FOIA. 5 U.S.C. § 552(a)(6)(C)(i). Defendants' failure to comply with FOIA's time limits has constructively exhausted all of Guardians' administrative remedies and put all questions of FOIA compliance within the jurisdiction of the federal courts.

57. This lawsuit is also necessary because Defendants have refused to provide a current estimated date by which Guardians' FOIA Request will be completed, an agency duty Congress imposed in 2007 to remedy widespread and casual violations of FOIA deadlines. 5 U.S.C. § 552(a)(7).

58. Though OSI stated that it planned to take an additional ten days to process the FOIA Request, it did not identify any exceptional circumstances supporting that decision, and none exist. 5 U.S.C. § 552(a)(6)(C). This point is further belied by the fact that OSI categorized this as a "normal" request, capable of being completed within six to twenty days. 43 C.F.R. § 2.15(c)(2). OSI has not exercised due diligence in responding to Guardians' FOIA Request. The delays at issue in this case result from predictable circumstances and agency workload of FOIA requests. OSI has not made reasonable progress in reducing its backlog of pending requests.

59. While OSI is failing to meet mandatory duties under FOIA, OSI is engaged in numerous discretionary activities for which OSI is not bound by statutory deadlines. Notably, OSI is engaged in discretionary rulemaking for DOI's Proposed FOIA Regulation Revisions.

60. Guardians now turns to this Court to provide relief that ensures Guardians, its membership, and the public have the prompt public access to agency records guaranteed by FOIA. 5 U.S.C. § 552(a)(3)(A), (a)(6).

61. Guardians seeks judicial orders compelling a proper search, lawful determination, and prompt production of responsive agency records not subject to FOIA withholding.

62. FOIA disputes are normally resolved on summary judgment, with the burden of proving FOIA compliance falling on the agency. During this litigation, Defendants must carry their burden of demonstrating all elements of FOIA compliance. Defendants may meet their litigation burdens by providing declarations, and disclosing contravening evidence in their possession, that address, among other things: a broad interpretation of the FOIA Request, lawful search, lawful cut-off date for each search, and the justification in a “*Vaughn* index” for withholding any agency record or part thereof.

63. FOIA provides additional statutory relief where the Court has granted the plaintiff statutory attorney fees and entered orders compelling disclosure of withheld records. In those cases, the Court may enter judicial findings that the defendants’ conduct in addressing a FOIA request involves circumstances that raise questions as to whether the defendants (here including OSI and DOI) acted arbitrarily or capriciously while violating the plaintiff’s rights involving timely FOIA access to agency records. 5 U.S.C. § 552(a)(4)(F). Defendants’ conduct in processing the FOIA Request is properly addressed by referral to Special Counsel for further investigation and remedy of the Defendants’ potentially arbitrary and capricious conduct. 5 U.S.C. § 552(a)(4)(F).

FIRST CLAIM FOR RELIEF

Violation of FOIA - Constructive Denial and Unlawfully Withholding Agency Records Responsive to the FOIA Request

64. Guardians repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

65. Defendants have not communicated to Guardians the full scope of the documents they intend to produce and withhold in response to FOIA Request OS-2019-

00322 or their reasons for withholding those documents, and have not disclosed to Guardians all records responsive to the FOIA Request.

66. Defendants violated FOIA (5 U.S.C. § 552(a)) by failing to provide a lawful determination and response to Guardians' December 27, 2018, request for agency records within the statutory period. 5 U.S.C. § 552(a)(6)(A)(i).

67. This failure to make a lawful determination on Guardians' FOIA Request within the time frame required by FOIA is a constructive denial and wrongful withholding of the records Guardians requested in violation of FOIA. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i).

68. Defendants continue to withhold agency records and violate FOIA by failing to provide a FOIA determination and by failing to promptly provide Guardians with responsive records that are not subject to a FOIA exemption. 5 U.S.C. § 552(a).

SECOND CLAIM FOR RELIEF

Violation of FOIA - Unlawfully Withholding Agency Records Responsive to FOIA Request that are not Subject to a FOIA Exemption

69. Guardians repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

70. Guardians has a statutory right to the records it seeks, and OSI has not used a FOIA determination to assert a legal basis for Defendants to withhold any record pursuant to any of FOIA's nine disclosure exemptions. *See* 5 U.S.C. § 552(b)(1)-(9).

71. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Guardians' FOIA Request and relieves Guardians of the burden and delay of filing an administrative appeal. 5 U.S.C. § 552(a)(6)(C)(i).

72. Defendants continue to violate FOIA by illegally withholding agency records that are responsive to the FOIA Request, but which Defendants have not demonstrated are subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

73. Defendants continue to violate FOIA by unlawfully withholding agency records that are responsive to Guardians' FOIA Request, but which are not subject to any FOIA exemption that allows withholding. 5 U.S.C. § 552(b).

THIRD CLAIM FOR RELIEF

Violation of FOIA – Failure to Conduct an Adequate Search

74. Guardians repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

75. Guardians has a statutory right to have Defendants process its FOIA Request in a manner that complies with FOIA. Guardians' rights in this regard were violated when the Defendants unlawfully failed to undertake a search reasonably calculated to locate records responsive to Guardians' FOIA Request.

76. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Guardians' FOIA Request and relieves Guardians of the burden and delay of filing an administrative appeal. 5 U.S.C. § 552(a)(6)(C)(i).

77. Defendants continue to violate FOIA by failing to conduct and document a lawful search for responsive records, which is a condition precedent to a lawful determination. On information and belief, responsive agency records have been withheld due to an unlawfully narrow search. 5 U.S.C. § 552(a)(3)(B)-(C).

REQUEST FOR RELIEF

WHEREFORE, Guardians respectfully requests that this Court enter judgment providing the following relief:

A. Enter findings and declare that each Defendant violated its duty to comply with FOIA's statutory deadlines;

B. Enter findings and declare that each Defendant violated FOIA by unlawfully withholding agency records responsive to Guardians' FOIA Request;

C. Enter findings and declare that each Defendant violated FOIA by failing to conduct a search reasonably calculated to locate the records responsive to Guardians' FOIA Request;

D. Direct by injunction that Defendants provide Guardians a lawful determination on Guardians' FOIA Request by a date certain;

E. Direct by order that each Defendant conduct a lawful search for responsive records;

F. Direct by order that each Defendant provide proof that a lawful search was conducted with a cutoff date set as the date of such order;

G. Direct by injunction that Defendants promptly provide all agency records responsive to Guardians' FOIA Request that are not subject to withholding pursuant to one of the nine recognized FOIA exemptions;

H. Direct by order that Defendants provide Guardians with a detailed statement justifying each withholding of an agency record, or portions thereof, in accordance with the indexing requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);

- I. Direct by order that Defendants provide Guardians with all responsive agency records by a date certain, within twenty working days of any such order;
- J. Grant Guardians' costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E);
- K. Enter a finding that Defendants' conduct with regards to Guardians' FOIA Request involves circumstances surrounding the withholding of records that raise questions of whether Defendants have acted arbitrarily and/or capriciously by withholding of records by delaying a determination, by not providing prompt access to responsive records, by withholding of records not subject to a FOIA exemption, by failing to conduct an adequate search, by failing to provide Guardians with a current estimated completion date for the request, and by failing to use the FOIA-mandated request tracking system and refer the matter to Special Counsel for administrative investigation and remedy, 5 U.S.C. § 552(a)(4)(F); and,
- L. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, July 26, 2019

/s/ Stuart Wilcox _____
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